



**DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:	)	
	)	
	)	ISCR Case No. 10-07461
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Daniel Crowley, Esq., Department Counsel  
For Applicant: *Pro se*

06/26/2012

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**Decision**

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HEINY, Claude R., Administrative Judge:

In March 2010, Applicant was arrested and later convicted of driving under the influence (DUI) of alcohol. Also in 2010, he knowingly broke the law by driving on a revoked or suspended license. Applicant has failed to rebut or mitigate the security concerns under the personal conduct, alcohol consumption, and criminal conduct guidelines. Clearance is denied.

**History of the Case**

Applicant contests the Department of Defense’s (DoD) intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,<sup>1</sup> the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) on October 13, 2011, detailing security concerns under

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<sup>1</sup> Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DoD on September 1, 2006.

Guideline E, personal conduct; Guideline G, alcohol consumption; and Guideline J, criminal conduct.

On January 23, 2012, Applicant answered the SOR and requested a hearing. On March 15, 2012, I was assigned the case. On April 10, 2012, DOHA issued a Notice of Hearing for the hearing held on April 26, 2012.

The Government offered exhibits (Ex.) 1 through 35, which were admitted into evidence without objection. Applicant testified and submitted Exhibits A through E, which were admitted into evidence without objection. On May 4, 2012, DOHA received the hearing transcript (Tr.).

### **Findings of Fact**

In Applicant's Answer to the SOR, he admitted some of the factual allegations in the SOR and denied the remainder. His admissions are incorporated herein. After a thorough review of the pleadings and exhibits, I make the following findings of fact.

Applicant is a 56-year-old general engineer who has worked for a defense contractor since April 2004, and seeks to maintain a security clearance. From March 1974 to March 1978, he served on active duty in the U.S. Air Force. (Ex. 14) He left the service as an E-4. While working for a DoD contractor, he deployed to Iraq three times for 90-day periods in 2004, 2005, and 2006. In 2007, he deployed to Afghanistan for 90 days. (Ex. 20) Applicant is past president of his American Legion Post.

Applicant's supervisor states Applicant is a reliable, well respected employee willing to "go to the ends of the earth to support our mission." (Ex. C) Applicant is also a dedicated husband, father, and patriot. (Ex. C) A co-worker states, Applicant is honest, open, and can be counted on to do the job. His work is of the highest caliber. (Ex. D)

Between 1974 and March 2010, Applicant was arrested numerous times on a variety of charges. In March 2010, he was arrested and pleaded guilty to Operating a Vehicle Under the Influence of an Intoxicant (Alcohol) (OMVUII).

In February 1974, Applicant was arrested for possession of marijuana.<sup>2</sup> The charge was later dropped. In October 1976, he was arrested and found guilty of Driving Under the Influence (DUI). He paid a \$400 fine and was placed on probation for six months. In December 1977 and February 1978, he was arrested and convicted of Contempt of Court/Driving While Suspended. In January 1983, he was again arrested for Contempt of Court. In 1980, 1983, and 1986, he was arrested for failing to pay child support. (Ex. 2, 3, 4, 22, 23) In July 1987, he was arrested and charged with Telephone Harassment/Threat. (Ex. 4, 11) The charge was dropped. In June 1988, January 1991, July 1991, August 1993, March 1997, and July 1999, he was arrested and charged with

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<sup>2</sup> In January 1977, Applicant – then 19 years old – was a passenger in a car stopped by police. A search of the vehicle discovered a plastic bag containing marijuana under the passenger's seat. (Exs. 2, 5, 13) The charge was later dropped.

Assault/Family Violence. (Exs. 3, 4, 7, 8, 9, 10, 24, 26, 31) The charges were dropped or dismissed. (Ex. 24, 27)

On Mother's Day in May 2003, Applicant was arrested for aggravated assault with a deadly weapon. In July 2007, the charges were dismissed. (Ex. 4) Applicant's step-son hit him twice on the head with a billy club. (Ex. 28) Applicant then hit his step-son with a billy club. The Assistant District Attorney found Applicant had acted after being attacked and the charges were dismissed. (Ex. 18, 29)

In 1974, Applicant was granted a secret clearance. In December 1994, he completed a National Agency Questionnaire (NAQ). (Ex. 6) On December 14, 2007, Applicant was issued an SOR for security concerns under Guideline J, criminal conduct, and Guideline E, personal conduct. (Ex. 17) On March 26, 2008, a hearing was held before a DOHA administrative judge (AJ). (Ex. 19) The criminal conduct concern was mitigated because five years had passed since Applicant's May 2003 arrest. (Ex. 20) Additional favorable information included: his current domestic situation was stable, his favorable performance reviews, overseas deployments, and his position as commander of his American Legion Post. The personal conduct concerns were also mitigated due to the passage of time and because the government had granted Applicant access to classified information despite his failure to list all of his arrests and despite his 2006 admission he had not listed his 1973-1974 marijuana usage. (Ex. 20) The facts found in that decision are relied upon and adopted as accurate and relevant.

In the early morning of New Year's Day, January 1, 2010, a heated argument got out of control resulting in an altercation with his wife's son. (Ex. 31) Applicant asserts he was sober. However, the police incident report states all "subjects were intoxicated, and uncooperative." (Ex. 31)

On St. Patrick's Day 2010, Applicant was drinking at an Irish pub from 7 p.m. until 1 a.m. On March 18, 2010, he was stopped for speeding and arrested for OVUII, which makes it a crime under state law to operate a motor vehicle with blood alcohol content—concentration (BAC) equal to or above 0.08%. (Ex. 32) At the time of his arrest his BAC was 0.16. (Ex. 32) He pleaded guilty to the offense. (Ex. 33) His driver's license was suspended for 180 days; he paid a \$604 fine, and completed a 12-hour DUI awareness course in May 2011. (Ex. B) At various times during 2010, he knowingly drove while his license was revoked or suspended. (Ex. 35)

In April 2011, Applicant underwent a clinical alcohol assessment, which included a clinical interview, and administration of three alcohol screening instruments including the Michigan Alcohol Screening Test (MAST), the Alcohol Use Disorder Identification Test, and the Texas Christian University Alcohol-Drug Screen 2. (Ex. 34) The results of the screening tests were below the cutoff points which would indicate a current substance abuse problem. There was no indication the evaluator knew Applicant's history of alcohol use and abuse. The assessment states Applicant "had a singular misadventure as opposed to being a frequent drinking driver." (Ex. 34)

## Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which must be considered in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the interests of security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order (EO) 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *a/so* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## Analysis

### Personal Conduct

Adjudicative Guideline (AG) ¶ 15 articulates the security concerns relating to personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The Personal Conduct Disqualifying Conditions under AG ¶ 16 are potentially applicable:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:

(3) a pattern of dishonesty or rule violations

Between 1974 and March 2010, Applicant was involved in numerous arrests and violations of the law. Many of these arrests are not recent. However, in March 2010, approximately two years ago, Applicant operated a vehicle while under the influence of an intoxicant. His BAC was .16%. He pleaded guilty to the offense. Approximately two months earlier, he was involved in an altercation with his wife's son. He denies being intoxicated at the time, but the police report states all individuals were intoxicated and uncooperative.

In 2010, Applicant knowingly broke the law by driving on a revoked or suspended license. He should know the seriousness of such actions because in December 1977 and February 1978, his similar conduct resulted in his arrest, conviction, fine, and one year of probation.

Security concerns raised by personal conduct may be mitigated if “the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment” AG ¶ 17(c). Applicant's conduct during 2010 did not involve minor offenses. He was arrested on St. Patrick's Day for drunk driving. On a different occasion, the police went to his residence on a domestic matter. He drove even though he knew his driver's license was suspended or revoked. I conclude that his offenses were not “minor” within the meaning of this guideline. Additionally, due to the number of similar incidents, these events did not occur under unique circumstances.

The key question is whether his conduct is mitigated by the passage of time. There are no bright line rules for determining when conduct has been mitigated by the passage of time. The determination must be based on a careful evaluation of the totality of the evidence. See ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows “a significant period of time has passed without any evidence of misconduct,” then an administrative judge must determine whether that period of time demonstrates “changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.” *Id.* Applicant's last misconduct was in March 2010, just over two years ago. This arrest occurred after being evaluated for a security clearance for similar conduct. He had been granted a clearance two years before his most recent arrest. AG ¶ 17(c) does not apply.

Security concerns raised by personal conduct also may be mitigated if “the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur” AG ¶ 17(d). An April 2011 assessment by the Division of Driver Education states the screening tests did not indicate a current substance abuse problem. The credentials of the individual making this statement were not provided. In the January 2010 altercation, Applicant states he was not intoxicated, which contradicts the police report.

Applicant has not acknowledged some of his inappropriate behavior. Considering the numerous assault and family violence incidents, I am not satisfied that his behavior is unlikely to recur. AG ¶ 17(c) does not apply.

Those allegations alleged to have occurred prior Applicant's 2007 hearing are found for him. However, the alcohol and family violence assault arrests and other incidents are considered in evaluating the allegations which occurred after Applicant's 2007 hearing. Specifically, they are considered in evaluating Applicant's March 2010 DUI, the January 2010 altercation with his wife's son, and his driving on a revoked or suspended license.

### **Alcohol Consumption**

AG ¶ 21 expresses the security concern pertaining to alcohol consumption, “Excessive alcohol consumption often leads to the exercise of questionable judgment or

the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness.”

Applicant is 56 years old. In October 1967, he was arrested for DUI and later convicted. In March 2010, more than 40 years later, he was again arrested and later convicted of DUI. At the time of his most recent arrest his BAC was .16%, twice the legal limit. AG ¶ 22 (a) “alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent,” and AG ¶ 22 (c) “habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent,” apply.

None of the mitigating factors listed in AG ¶ 23 apply. Applicant’s last DUI arrest was approximately two years ago, and his first DUI arrest more than 40 years ago. He had a number of alcohol-related arrests between those dates. It is too early to predict Applicant’s alcohol problem is a thing of the past. AG ¶ 23(a) “so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment,” does not apply because his alcohol-related incidents involving the police and courts are recent, are not infrequent, nor did they happen under unusual circumstances.

An April 2011 assessment by the Division of Driver Education stated the screening tests did not indicate a current substance abuse problem. Applicant had a clinical interview and was administered three alcohol-screening tests. However, there is no indication that the evaluator knew of Applicant’s history of alcohol use and abuse for he stated Applicant had a single misadventure. I find AG ¶ 23(d) “the individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare, has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in meetings of Alcoholics Anonymous or a similar organization and has received a favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program,” does not apply. He presented no documents related to his attendance or completion of any alcohol-related counseling or treatment. He has not received a reliable favorable prognosis by a qualified medical professional or a licensed clinical social worker.

## **Guideline J, Criminal Conduct**

The SOR cross-alleges Applicant’s personal conduct as criminal conduct listing the majority of the SOR allegations previously listed under personal conduct. The concern raised by criminal conduct is set out in AG ¶ 30: “Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.”

Disqualifying conditions under this guideline include “a single serious crime or multiple lesser offenses” and “allegation or admission of criminal conduct, regardless of

whether the person was formally charged, formally prosecuted, or convicted.” AG ¶¶ 31(a) and (c) apply. Applicant has had numerous arrests including a drunken driving arrest after his DOHA hearing in 2007 that had reviewed similar conduct.

In AG ¶ 32(a), security concerns raised by criminal conduct may be mitigated by evidence that “so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment.” Under AG ¶ 32(d), a security concerns also may be mitigated if “there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.”

Applicant’s last arrest was approximately two years ago and thereafter, he drove while his license was suspended or revoked. These are relatively recent events and not in the distant past. AG ¶¶ 32(a) and 32(d) do not apply.

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an applicant’s eligibility for a security clearance by considering the totality of the applicant’s conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual’s age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. He has demonstrated his loyalty, patriotism, and trustworthiness through his service to the DoD as a contractor. He has served in combat zones in Iraq and Afghanistan as a contractor. He has risked his life to support DoD missions in those countries. He is also a past commander of his American Legion Post.

In 2007, the majority of the current SOR allegations were reviewed. At that hearing the criminal conduct and personal conduct was found to be mitigated and Applicant was granted a clearance. Following the hearing, Applicant was arrested and convicted of DUI and drove while his license was revoked or suspended. The DUI arrest



occurred approximately two years ago and his driving while on a revoked or suspended license were more recent. It is simply too soon to reinstate Applicant's security clearance.

This decision should not be construed as a determination that Applicant cannot or will not attain the state of true reform and rehabilitation necessary to justify the award of a security clearance. The awarding of a security clearance is not a once in a life time occurrence, but is based on applying the factors, both disqualifying and mitigating, to the evidence presented. Under Applicant's current circumstances a clearance is not recommended, but should Applicant be afforded an opportunity to reapply for a security clearance in the future, he may well demonstrate persuasive evidence of his security worthiness.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his personal conduct, alcohol consumption, and criminal conduct security concerns.

### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Personal Conduct:	AGAINST APPLICANT
Subparagraphs 1.a – 1.u:	For Applicant
Subparagraphs 1.v and 1.w:	Against Applicant
Paragraph 2, Alcohol Consumption:	AGAINST APPLICANT
Subparagraphs 2.a – 2.d:	Against Applicant
Paragraph 3, Criminal Conduct:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant a security clearance. Eligibility for access to classified information is denied.

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CLAUDE R. HEINY II  
Administrative Judge